United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 28, 2003

TO : Celeste J. Mattina, Regional Director
Karen P. Fernbach, Regional Attorney
Elbert Tellem, Assistant to the Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: WorldCom International Data Services, Inc.
Case 2-CA-35278
530-6067-2030-5050
712-5028-1267
712-5070-8000

This case was submitted for advice on whether the Employer may be held liable under Section 8(a)(5) for the alleged improper accounting practices of its parent company that dramatically reduced the value of the parent's stock options that the Employer granted to the employees in negotiations with the Union.[1]

We conclude that the Employer cannot be held liable for the alleged improper accounting practices of its parent, since the parent was not acting as an agent of the Employer when it allegedly engaged in fraudulent accounting practices.[2]

BACKGROUND

WorldCom Inc. (WorldCom), a Georgia corporation, provides a broad range of communications services to business and consumers in more than 65 countries. In 1988, WorldCom acquired MCI Communications Corporation (MCI). Western Union International (WUI), a subsidiary of MCI, had

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[1] The Region's investigation as to whether WorldCom, the parent company, engaged in improper accounting practices is thus far based on WorldCom's press releases, SEC pleadings and press releases, and other publications. The Region was prepared to investigate whether WorldCom's financial statements in fact contained undisclosed and improper accounting, if we concluded that the Employer could be held liable for that conduct under Section 8(a)(5) of the Act.

[2] The Region also requested advice on the timeliness of the charge under Section 10(b) and the appropriate remedy to seek in a Section 8(a)(5) complaint. However, in light of our conclusion that the charge should be dismissed, we will not address these additional issues.

a collective bargaining relationship with Teamsters Local 111, the Union. The most recent agreement between WUI and the Union was effective from February 1, 1996 to February 1, 1999 (later extended to April 1, 1999). IDB WorldCom Services (IDB), a subsidiary of WorldCom, also had a collective bargaining relationship with the Union. The most recent agreement between IDB and the Union was effective from September 11, 1997 to September 10, 2000.

In June 1999, WUI and IDB merged operations, with WUI becoming the surviving entity. All parties agreed that the IDB contract with the Union would terminate, and that WUI would recognize and bargain with the Union as the bargaining representative of both the WUI and IBD employees. In February 2000, the new merged corporate entity became WorldCom International Data Services, Inc. (IDS), the Employer in the instant case.

FACTS

The Employer, an indirect subsidiary of WorldCom through the corporate transactions just described, provides international telex and messaging services and other international communications. In March 1999, the Union and the Employer began negotiations for a successor collective-bargaining agreement. It appears that in exchange for concessions in pension benefits, on March 31, the Union requested that all the Employer's employees be included for the first time in WorldCom's stock option plan. The Employer agreed, and the final agreement provides that each former WUI employee is eligible for a grant of 750 stock options in WorldCom's shares vesting over a period of three years. The strike price, which is the price at which the employees could exercise their options, was set at $69 per share.[3] At the time of these negotiations, the value of WorldCom's stock on the market ranged from $82 to $91 dollars per share.

On June 25, 2002, WorldCom issued a press release stating that it intended to "restate its financial statements" for 2001 and the first quarter of 2002. It stated that it determined that certain records were not consistent with general accounting practices. As a result, WorldCom overstated its income by $3.055 billion in 2001 and $797 million during the first quarter of 2002.

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[3] Prior to the WUI-IDB merger, only IDB employees participated in WorldCom's employee stock option plan.

On June 27, 2002, the Securities and Exchange Commission (SEC) filed a suit against WorldCom charging that "[f]rom at least the first quarter of 2001 through the first quarter of 2002, [WorldCom] defrauded investors." The complaint alleged that WorldCom "disguised its true performance by using undisclosed and improper accounting ..." and that as a result, WorldCom overstated its income by $3.055 billion in 2001 and $797 million during the first quarter of 2002.

On July 21, 2002, WorldCom and most of its subsidiaries, including the Employer, filed a voluntary petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York.[4] WorldCom's petition for bankruptcy protection is the biggest in U.S. corporate history.

On August 8, 2002, WorldCom issued a press release stating that its ongoing internal review had discovered an additional $3.3 billion in improperly reported earnings for 1999, 2000, 2001, and the first quarter of 2002. The release states that this amount is in addition to the amount it previously misreported for 2001 and the first quarter of 2002. On November 5, 2002, the SEC amended its June 25 complaint to allege that "[f]rom at least as early as 1999 through the first quarter of 2002 [Worldcom] misled investors." The SEC alleged that WorldCom has acknowledged that during this period, as a result of "undisclosed and improper accounting," it overstated its income by $9 billion.

On November 26, 2002, WorldCom consented to a permanent injunction that resolved part, but not all, of the SEC's allegations. By the terms of the agreement, WorldCom neither admitted nor denied the SEC's allegations, but is precluded from arguing in subsequent proceedings that it did not violate the federal securities laws as alleged in the consolidated complaint.

The Union filed a charge in this matter on February 4, 2003, alleging that the Employer violated Section 8(a)(5) and (1) of the Act by inducing the Union to make bargaining concessions in return for the Employer's granting unit members eligibility to participate in a stock option plan that was fraudulently overvalued. The Union does not allege, and there is no evidence to establish, that the Employer's negotiators during the 1999 negotiations for a successor agreement had knowledge that WorldCom's stock was

[4] Docket No. 02-13533.

overvalued based on its undisclosed and improper accounting practices.

WorldCom's stock is currently valued at less than one dollar per share.

ACTION

We conclude that in the circumstances of this case, the Employer cannot be held liable for the alleged improper and undisclosed accounting practices of its parent, and therefore the Region should dismiss the charge, absent withdrawal.

We agree with the Region that an Employer who engages in fraudulent conduct in bargaining violates Section 8(a)(5) of the Act.[5] In this case, it is the Employer, and not its parent, WorldCom, that has the duty to bargain in good faith with the Union. The Employer's conduct at or away from the bargaining table does not establish a violation, since there is clearly no evidence to establish that the Employer was complicit in or even knew of its parent's alleged improper accounting. Thus, the Employer may only be held liable for WorldCom's conduct if the two entities are a single employer, such that WorldCom's conduct would directly be governed by Section 8(a)(5). Or, the Employer may be held liable if an agency relationship existed between WorldCom and the Employer with respect to WorldCom's improper accounting practices and their effect on the stock options. There is no allegation or evidence to support a theory of single employer. Accordingly, we consider the agency issues.

In determining whether a person is acting as an agent of another, the Board applies common law principles of agency.[6] According to the Restatement 2nd of Agency, "agency is the fiduciary relation which results from the manifestation of consent by one person to another that the

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[5] See e.g., Waymouth Farms, Inc. 324 NLRB 960, 961-962 (1997), enforced in pertinent part 172 F.3d 598 (8th Cir. 1999) (bad faith bargaining where employer misrepresented intentions and plans regarding plant relocation during negotiations with the union; "good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims"), quoting NLRB V. Truitt Mfg. Co., 351 U.S. 149, 152 (1956)).

[6] See Allegany Aggregates, Inc., 311 NLRB 1165 (1993), citing Dentech Corp., 294 NLRB 924 (1989) and Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82 (1988).

other shall act on his behalf and subject to his control, and consent by the other so to act."[7] It further states that "the one for whom action is to be taken is the principal," and "the one who is to act is the agent."[8] Section 2(2) of the Act states that the term "employer" includes an employer's "agents" and Section 2(13) notes that with regard to the Employer's responsibility for the acts of its agents, "whether specific acts performed were actually authorized or subsequently ratified shall not be controlling."[9] In that vein, the Restatement states, "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting with his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."[10]

We can conceive of no factual basis to conclude that WorldCom at any time acted as an agent of the Employer either for the purposes of bargaining the current agreement between the parties or when allegedly engaging in improper accounting practices. WorldCom was never present at the bargaining table on behalf of the Employer, nor is there any evidence that would otherwise show that WorldCom acted on behalf of or at the direction of the Employer when it engaged in improper accounting practices. In these circumstances, the mere fact that WorldCom permitted the Employer to offer the WorldCom stock option program to its employees is insufficient to establish that WorldCom was an agent of the Employer either at the bargaining table or in the commission of alleged accounting improprieties.[11]

We recognize that, if anything, the Employer conversely may be considered an agent of WorldCom for the limited

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[7] Restatement 2d, Agency § 1 (1958).

[8] Id.

[9] See e.g., API Industries, 314 NLRB 706 n. 1 (1994), (employer liable under doctrine of apparent authority for acts of agent even if they are contrary to the employer's instructions.)

[10] See Rest. 2d Agency § 261 (1958).

[11] Cf. In re Worldcom, Inc., 2003 WL 21488087, *9-10 (S.D.N.Y. June 25, 2003) (bare allegation that European entity was an "umbrella organization for its members world wide" was insufficient to plead that entity could be held liable as a "principal" for fraudulent conduct of one of its members.)

purpose of facilitating the grant of WorldCom stock options to the Employer's employees. As such, the Employer may have "brokered" the grant of WorldCom options to the employees. However, adopting such an approach would not provide grounds for a complaint in this matter. First, we note that it was the Union that initially requested that the WorldCom stock option plan be included in the collective-bargaining agreement. It was not initially proposed by the Employer and there is no evidence that the Employer made any representations whatsoever about the value of the stock options. Nonetheless, even if the Employer had misrepresented the value of the options based on information provided by WorldCom, it is clear that the alleged fraudulent conduct of WorldCom, as a principal, cannot be charged to the Employer, as an agent.[12]

In all these circumstances further processing of these charges would be unwarranted.

B.J.K.

[12] See, e.g. Joe Dan Int'l Corp. v. United States Fidelity & Guaranty Co., 533 N.E. 2d 912, 915-16 (Ill. App. Ct. 1998) (agent not generally liable for breach of contract by his principal, if agent is acting on behalf of principal); Sparks v. Re/Max Allstar Realty, Inc., 55 S.W.3d 343, 349 (Ken. App. Ct. 2001), (homebuyers' real estate agent, who recommended extermination company, could not be held liable for inadequate work of exterminator); In re WorldCom, Inc., 2003 WL 21488087 (S.D.N.Y. June 25, 2003)(investors fail to state claim against partners in accounting firm for approving audit, notwithstanding they had valid claim against firm itself for alleged securities fraud, where no evidence partners were aware of the fraud.)